

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 799 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.DAVE and

MR.JUSTICE R.R.JAIN

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1. Whether Reporters of Local Papers may be allowed  
to see the judgements? No
  2. To be referred to the Reporter or not? No
  3. Whether Their Lordships wish to see the fair copy  
of the judgement? No
  4. Whether this case involves a substantial question  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder? No
  5. Whether it is to be circulated to the Civil Judge?  
No
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RAMLAL CHANDAN JAT

Versus

STATE OF GUJARAT

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Appearance:

MS SHILPA R SHAH for Petitioner

MR.S.R.DIVETIA,LD.PUBLIC PROSECUTOR for Respondent No. 1

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CORAM : MR.JUSTICE S.D.DAVE and

MR.JUSTICE R.R.JAIN

Date of decision:24/12/96

CAV JUDGEMENT

Per: S.D. Dave, J :-

The Appellant Accused Ramanlal Jat came to be  
convicted for the offence punishable under section 15 of  
the Narcotic Drugs & Psychotropic Substances Act,1985

(NDPS Act,1985) and under section 66 (b) of Bombay Prohibition Act of 1949, by the Ld. Addl.Sessions Judge, City Sessions Court, Ahmedabad in Sessions Case No.240 of 1993 under the orders dated July 29, 1994 and has been sentenced to the R.I. for ten years and to a fine of Rs.1,00,000-00; in default to the further R.I. for six months. He came to be acquitted of the offence punishable under section 21 (b) of the NDPS Act,1985. The appellant accused challenges the above said judgment of conviction and sentence by filing the present appeal before this Court.

One Becharbhai Patel, the Head Constable attached to Kalupur Police Station had received the information on April 12, 1993, at about 10.35 a.m. through an informant that, one man with the Poppy Straw, popularly known as "Poshna Doda", wearing white shirt, black pant and yellow metal armlet would be passing from nearby Alankar Cinema premises, and that, therefore, he had informed PSI Mr. Vaghela; and necessary entry in the Station Diary was made and the raid was arranged. They had taken two panchas with them and while they were on the watch, a man of the above said description carrying two potkas and a black bag (thaila) was found to be passing from the nearby area known as Alankar Cinema, and on interception he had given his name as Ramanlal, and later on two potkas and the bag were searched and seized. The samples were drawn and were forwarded to the FSL Experts. The sample drawn from the above said quantity was of Poppy Straw. The FSL Expert had reiterated that, it being the Poppy Straw, would be a contraband falling within the NDPS Act,1985.

The appellant accused had pleaded not guilty to the charges levelled against him and had claimed to be tried. Later on, upon the appreciation of the evidence on record, the Ld. Trial Judge has come to the conclusion that, the above said offences were duly established. This finding on the part of learned trial Judge has resulted in the above said judgment of conviction and sentence, which is under challenge before us.

Ld. Counsel Ms. Shilpa Shah for the appellant accused urges by way of two principal contentions that, the investigation does not appear to be a transparent one and that, the muddamal itself and the samples drawn therefrom were handled in such a fashion that, one cannot rule out the possibility of tampering with them. Ld. counsel therefore urges that, the Court below was not justified in recording the judgment of conviction and

sentence. Any how, the contention coming from Ld. Govt. Counsel Mr. S.R. Divetia is that, no exception could be taken with the case of the prosecution on any of the above said two counts, and that the judgment under challenge is based upon legal, reliable and unimpeachable evidence and no intervention by us by way of the present appeal appears to be a justifiable exercise.

Assailing the transparency of the investigation, Ld. counsel for the appellant Ms. Shilpa Shah urges that, there are two versions of the case. According to the learned counsel, one version says that the appellant accused along with his companion Mansingh Thakur had alighted from a passenger bus coming from Rajasthan at Ahmedabad on April 12, 1992, at about 3.30 a.m. along with the muddamal Poppy Straw, and the above said quantity was to be handedover to one Johrabibi staying near Kalupur Kot. According to learned counsel, later on the companion of appellant accused Mansingh Thakur had escaped and though the case against Johrabibi also came to be registered, and though she came to be arrested, later on she has not been proceeded with in the case. It is also the contention coming from learned counsel for the appellant accused that, no investigation was directed towards Mansingh Thakur and that, he was not arrested and was not arraigned as the accused in the case. In the same way, there was absolutely no mention of Mansingh Thakur in the charge sheet which came to be filed against the appellant accused.

When the evidence of the police officials is perused, it becomes clear that, this was definitely a version. Any how, adopting the second version it has been alleged and sought to be proved against the appellant accused that, he was noticed during the raid at about 10.30 p.m. near Alankar Cinema and that, he was the lone man to be found with the muddamal quantity of Poppy Straw, as if the remaining two persons were not in the picture. Head Constable Becharbhai Patel, PW-11 Exhibit-41 has said in his evidence that, he had received the "secret information" on April 12, 1993, at about 10.35 a.m. and that the same was transmitted to PSI Shri. Vaghela and later on, after posting the entry in the Station Diary, the raid was arranged. The same is the version given by PW-6 Bismillakhan Pathan, Exhibit-22. According to him, at the relevant time he was working as Head Constable attached to Kalupur Police Station and Becharbhai had furnished the necessary information to PSI Vaghela, and later on the raid was made and the appellant accused along with the Poppy Straw quantity was apprehended and other formalities were performed. PSI

Pravinsinh Vaghela PW-9 Exhibit-28 says that, he had received the information from Constable Becharbhai that one man wearing white shirt, black pant and having yellow metal armllet was to pass very near Alankar Cinema, and would be going towards Kalupur Circle and therefore the raid was made in presence of the panchas. P.I. Govindsing Chavda, PW-10 Exhibit-40 also had testified to the above said effect and has said that, on the basis of the information the appellant accused was intercepted and the muddamal Poppy Straw came to be recovered from him. Thus all this evidence read along with the evidence of panch witness Hiresb Zaveri, PW-1 Exhibit-5, makes it abundantly clear that, the case put forth in the charge sheet and sought to be proved before the learned trial Judge was in respect of the appellant accused alone. In other words, it was never the case of the prosecution that the accused and his companion Mansingh Thakur had alighted from a passenger bus coming from Rajasthan during the early morning hours and ultimately at about 10.30 a.m. the appellant accused and Mansigh, his companion, were found to be passing from near Alankar Cinema. But the above said original version surfaces on record from the evidence of PSI Vaghela, PW-9 Exhibit-28. He has stated after perusing the remand application Exhibit-37 that, in fact it has been stated in the said remand application at exhibit-37 that, the appellant accused and his companion Mansigh Thakur had alighted from a bus coming from Rajasthan on April 12, 1992 at about 3.30 a.m. and that the muddamal Poppy Straw was to be delivered to one Johrabibi residing at Ahmedabad at the relevant time. The remand application proceeds to say that, later on the appellant accused and his companion Mansingh were found to be going with the muddamal Poppy Straw and that Mansingh Thakur was able to escape.

The remand application at Exhibit-37 says in terms that the accused had got down at 3.30 a.m. on April 12, 1993 at Kalupur Railway out gate in company of one Mansingh Thakur and that, the muddamal Poppy Straw was to be handed over to one Johrabibi residing near Kalupur Darwaja. The evidence tendered by PSI Vaghela is read with Exhibit-37 would go to show that the appellant accused came to be arrested at 3.30 p.m. in furtherance of a raid which was made at about 10.30 a.m. Not only the timings are not given but there is also no say in the remand application at Exhibit-37 that the appellant accused was intercepted and later on apprehended from near Alankar Cinema area.

Thus, it is abundantly clear that the case in

respect of two remaining accused persons came to be given a go-bye during the later part of the investigation and at the time of the filing of the charge sheet against the appellant accused. The interesting part to be noticed is that, under the very same Crime Register Number the same offence were registered against Johrabibi and she was put under the arrest also. Later on it appears that, by submitting the necessary report under section 169 of the Code of Criminal Procedure, 1973, it was notified to the Court that, Johrabibi was not required to be prosecuted. But the case regarding another co-accused Mansingh Thakur, who, according to the remand application itself was found to be in the company of the appellant accused appears to be more amusing. No report under section 169 of the Code of Criminal Procedure, 1973, came to be filed in his respect. PSI Vaghela, while trying to explain away this situation, on the contrary queerly says that, though the appellant accused was taken on police remand, with a view to make further investigation qua absconding accused Mansingh Thakur, he could not carry on further investigation because he was engaged in other inquiries and bundobust duties. This say of PSI Vaghela would go to show that, he has not at all made necessary investigation or inquiry qua the absconding accused. Any how, in the next line during the cross examination he has preferred to say that, there was absolutely no evidence against the absconding accused Mansingh and therefore no mention in his respect has been made in the charge sheet and that, he has not been shown as the absconding accused. This explanation coming from PSI Vaghela hardly appears to be genuine or appealing to a judicial conscience.

The conclusion therefore would be that, the version which appears to be the earliest and the original would be that, two persons had got down during early morning hours at Ahmedabad from a passenger bus coming from Rajasthan and, as it is apparent, from the application for remand exhibit-37, the companion of the appellant accused Mansingh Thakur was able to abscond. This all could have occurred in the early morning hours. This probability cannot be ruled out. If at all the version sought to be placed before the trial Court was a correct one, then also the prosecution was required and was duty bound to say that, according to their version two persons, including the appellant accused had alighted from a passenger bus during the early morning hours, and later on at about 10.30 a.m. both of them were passing from near Alankar Cinema, but ultimately the appellant accused alone could be apprehended. This being not done, we must say that the prosecution cannot be said to be a

transparent one. On the contrary, it appears that, for the reasons best known to the investigating agency, the appellant accused was sought to be shown as the lone man carrying the muddamal Poppy Straw, without making a reference to his companion Mansingh Thakur, which according to the other version was very much there in the company of the appellant, but was able to escape.

We could have overlooked the above said anomaly in the case of the prosecution, provided, other evidence on record was found to be inspiring the confidence of a judicial mind. We must hasten to say that, unfortunately this is not the case. This becomes clear when the second contention of Id. Counsel Ms. Shilpa Shah for the appellant accused is examined. The grievance voiced by learned counsel is that, the muddamal itself and the samples drawn therefrom were not handled in an ideal manner and that, the possibility of tampering with them cannot be ruled out. The reference in this respect, while examining this contention requires to be made to the evidence tendered by Panch Witness Hires Zaveri, PW-1 Exhibit-5. He has stated that, the appellant accused was found to be going with two potkas and a bag (Bagal Thaila) and he was intercepted. The quantity was weighed and the samples were drawn. But during the cross examination he comes out with a candid confession by saying that, though the definite weight of the Poppy Straw recovered from two Potkas and the bag is mentioned in the panchanama, he does not know as to how and where the weighment of the potkas and the bag was done. He says further that, he could learn from the interse talk of the police officials regarding the weight of the muddamal quantity of the Poppy Straw, and that the said weight came to be reflected in the panchanama. He has clarified this situation by saying that, the weighment was not done in their presence. According to him, the police officials had gone to a nearby place for the weighment of the muddamal Poppy Straw. In the same way he says that, later on after the expert from the FSL had come there, three samples each weighing of one kg. were drawn, but at that time also the weighment was not done in the presence of panchas, including himself. He has categorically stated that, when the weighment of the muddamal quantity and the samples was being done he and the other panch along with the accused were standing near Gurunanak Hotel, where the appellant accused was apprehended. It is thus clear that, on two occasions, firstly for weighing the muddamal quantity and later on for weighing the samples the concerned quantity and the samples were taken away by the police officials and everything was done in their absence. Accused was also

not present on the spot of the weighment. When the FSL Report at Exhibit-23 is examined, it is apparent that the samples were not weighing one kg. each but they were more than one kg. Exhibit-A/1 was weighing 1.65 kgs, Exhibit-B/1 was weighing 1.75 kgs. while Exhibit-C/1 was weighing 1.130 kgs. This FSL Report therefore would go to show that the samples drawn were not of one kg. each. Head Constable Pathan PW-6 Exhibit-22 confirms this position by saying that, the weighment was got done by PSI Vaghela and Police Constable Mafatsing and for this purpose they had gone to an Ice Depot situated in a nearby street. He has also stated that, later on PSI Vaghela had come back and he had given the details of the weighment which were recorded in the panchanama. He has also made it abundantly clear that, when the weighment of the muddamal quantity of Poppy Straw and the samples had been done, the panchas were not taken there. Sr. Scientific Assistant Devendrakumar Dave, PW-7 Exhibit-24 also says while confirming this position that, when in response to an urgent call he had reached near Gurunanak Hotel the police officials had informed him that, the weighment of muddamal quantity of the Poppy Straw has been done. He has further stated that, he had advised the police officials to draw three samples from the said quantity, and later on the samples were drawn and for the purpose of the weighment of the samples the police officials had gone inside the street situated nearby.

Thus, this evidence would go to show beyond any manner of doubt that, after the raid was made and allegedly the muddamal quantity of Poppy Straw came to be seized, the entire quantity was taken away by PSI Vaghela and Police Constable Mafatsing to a street situated in the vicinity, and later on the samples which were drawn also were taken to the same place in the nearby street. It is abundantly clear, as has been deposed by PSI Vaghela that, when the weighment was done, the owner of the Ice Depot was not present but a boy who was probably working on the depot was present. Any how admittedly no statement of the helper working on the Ice Depot has been recorded.

The matter does not rest here. Sr. Scientific Assistant, PW-7 D.N. Dave, Exhibit-24 has also said that, when he was called near Gurunanak Hotel, on the spot, he had seen that the sample packets were taken away by the police officials and had come back on the spot after the weighment. He has also stated that, he was not able to see the place where the police officials had gone for the weighment. He has also stated that, at the initial juncture he had asked the police officials to

prepare the samples and to send the same to the FSL for the purpose of investigation and analysis. This evidence also tendered by witness Dave would go to show that the sample packets were taken away by the police.

There is the discrepancy in the evidence also regarding the affixing of the seal of the concerned police station. PSI Vaghela, PW-9 Exhibit-28 has said that, the muddamal quantity of Poppy Straw and the samples were sealed on the spot and the seals of the concerned police station, that is Kalupur Police Station were also affixed, both on the muddamal quantity and three samples. But the say of PSO Jadhav PW-4 Exhibit-55 is entirely different. He has stated that the muddamal and the samples were handed over to Writer Rumalji by him on the next day, that is on April 13, 1993 at about 9.30 a.m. He has also stated that, he being the PSO, the seal of the Kalupur police station was in his charge. But he has stated very clearly that the date on which the muddamal was seized and the samples were prepared, he had not applied the said seal on them. Writer Head Constable Rumaji PW-5 Exhibit-19 says that, on April 13, 1993, the muddamal was handed over to him by PSO Manharsinh Jadhav. His say further is that, later on, on the same day at about 10 to 10.30 a.m. he had handed over the samples to Head Constable Bismillakhan. He does not say anything in respect of affixing of the seal of the concerned police station on the muddamal samples. The say of PW-6 Bismillakhan Pathan at Exhibit-22 is that the seals were applied both on the muddamal and the samples just after the seizure. But this evidence runs counter to the other evidence on record, as indicated above. PSI Vaghela also has stated that the seals were applied to the muddamal quantity and the samples. But this say also being counter to the other evidence on record and especially of the witness in whose custody the seal was, cannot be accepted. Therefore, there is absolutely no convincing evidence to warrant a conclusion that the seal of the Police Station concerned was affixed on the muddamal quantity of Poppy Straw and the samples just after the seizure and preparation, respectively of the same. This also would go to create complications in the way of prosecution. Once again it shall have to be said that the possibility of tampering with both the muddamal quantity of the samples cannot be ruled out.

The provisions contained in NDPS Act, 1985, for the purpose of ensuring valid search and seizure either directory or mandatory have been given a clear go by. This evidence therefore would on the contrary lead to the conclusion that, there were ample opportunities for the



prosecution to tamper with the prosecution.

The elaborate provisions under the NDPS Act 1985 have been made with a dual purpose. The Legislature wanted to see that an innocent person is not falsely involved in the offence punishable under this act. But at the same time the Legislature wanted to ensure that, frivolous defences are not being put forth by the accused persons against the police officials. The way in which the seizure has been made and the samples have been prepared, it appears that the provisions of the NDPS Act 1985 have not been complied with, both in letter and in spirit, vitiating the search and seizure and ultimately the trial.

In our view, therefore, the prosecution gets vitiated because of the above said anomalies and the accused could not have been convicted on such evidence. We are therefore of the opinion that, the present appeal requires to be allowed. The same is hereby allowed. The appellant accused is acquitted of all the charges levelled and found to have been proved against him. The appellant accused is behind the bars, and therefore, he should be set at liberty forthwith, if not required in any other criminal case or proceedings.

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